Coastal Chemical Company *and* Teamsters Local 728. Cases 10–CA–24861 and 10–CA–25005

August 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On March 4, 1991, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Coastal Chemical Co., Savannah, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as new paragraph 1(b) and reletter the subsequent paragraphs accordingly.

''(b) Refusing to bargain collectively with Teamsters Local 728 by conditioning further bargaining on the Union's acceptance of the Respondent's unlawfully implemented contract proposal and the Union's withdrawal of its unfair labor practice charges.''

2. Substitute the following for paragraph 2(b).

''(b) If the Union so desires, revoke and cease giving effect to the unlawfully implemented wages, terms, and conditions of employment, and reinstate the wages, terms, and conditions that existed before the unlawful unilateral changes and make whole unit employees for any loss suffered as a result of these unilateral changes, with interest.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
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> To form, join, or assist any union
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> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
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> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Teamsters Local 728 as the exclusive bargaining representative of our employees in the unit described below, by unilaterally implementing changes in wages and terms and conditions of employment of these employees at a time when no impasse in bargaining has occurred.

WE WILL NOT refuse to bargain with Teamsters Local 728 by conditioning further bargaining on Teamsters Local 728's acceptance of our unlawfully implemented contract proposal or on Teamsters Local 728's withdrawal of its unfair labor practice charges.

WE WILL NOT unilaterally, and without consultation with Teamsters Local 728, institute or implement a drug testing program for employees who require treatment for job related injuries and WE WILL, on request, cancel, withdraw, and rescind the program we unlawfully put into effect.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with Teamsters Local 728 as the exclusive bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement:

> All production and maintenance employees, including warehouse employees, truck drivers and truck drivers helpers, employed by the Company at its Savannah, Georgia facility, but excluding all

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Although the judge found that the Respondent violated Sec. 8(a)(5) and (1) by conditioning further bargaining on the Union's acceptance of the Respondent's unlawfully implemented contract proposal and the Union's withdrawal of its unfair labor practice charges, he inadvertently failed to include this violation in his Conclusions of Law and to include an appropriate provision reflecting this violation in his recommended Order and notice. We therefore amend the Conclusions of Law by inserting the following as new par. 6 and renumbering the subsequent paragraphs accordingly:

> 6. By about June 8, 1990, conditioning further bargaining on the Union's acceptance of the Respondent's unlawfully implemented contract proposal and the Union's withdrawal of its unfair labor practice charges, the Company refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act.

We also shall modify the judge's recommended Order and notice accordingly.

In addition, we shall clarify par. 2(b) of the recommended Order.

office clerical employees, professional employees, guards and supervisors as defined in the Act.

If the Union so desires, WE WILL revoke and cease giving effect to the unlawfully implemented wages, terms, and conditions of employment, and reinstate the wages, terms, and conditions that existed before the unlawful unilateral changes and WE WILL make whole unit employees for any loss suffered as a result of these unilateral changes, with interest.

WE WILL bargain collectively, on request, with Teamsters Local 728 as the exclusive representative of the employees of the appropriate unit described above concerning the August 21, 1990 drug testing program and embody any understanding reached in a signed agreement.

WE WILL remove from the files of employees notices, reports, or memoranda resulting from the application of the August 21, 1990 drug testing program.

B. Renee Sanderlin, Esq., for the General Counsel.
Peter R. Spanos, Esq. and on brief only *Lori Ann Olejniczak, Esq. (Hendrick, Spanos & Phillips)*, of Atlanta, Georgia, for the Company.
Richard Smith, Representative, of Atlanta, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this Section 8(a)(5) and (1) case in trial on January 8 and 9, 1991. The case originates from unfair labor practice charges filed on July 23, 1990, in Case 10–CA–24861 and on October 23, 1990, and amended on November 23, 1990, in Case 10–CA–25005 by Teamsters Local 728 (Union) against Coastal Chemical Company (Company). On November 28, 1990, after an investigation, the Regional Director for Region 10 of the National Labor Relations Board (Board) issued an order consolidating cases, consolidated complaint and notice of hearing (complaint). It is alleged in the complaint that the Company on or about June 1, 1990, without the agreement and consent of the Union, instituted its contract proposal covering the production and maintenance employees and that the Company has at all times since on or about June 16, 1990, failed and refused to meet and bargain with the Union for a collective-bargaining agreement to succeed a previously expired agreement between the parties and that the Company, on or about August 21, 1990, unilaterally, and without notice to or consultation with the Union, implemented a drug testing policy not previously in effect and not contained in the Company's contract proposal which proposal had been made known to the Union.

All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs.

Based on the entire record, including a careful study of the posttrial briefs filed by counsel for the General Counsel and counsel for the Company, and on my observation of the witnesses as they testified and my judgment of the inherent probabilities, I conclude, as explained hereinafter, that the Company has violated the Act essentially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Company is a Georgia corporation with an office and place of business located at Savannah, Georgia, where it is engaged in the manufacture and sale of cleaning solutions. During the calendar year preceding issuance of the complaint herein, which constitutes a representative time, the Company sold and shipped from its Savannah, Georgia, plant goods valued in excess of $50,000 directly to customers located outside the State of Georgia. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties admit, and I find, the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Related Facts*

The Company and Union were parties to a collective-bargaining agreement effective by its terms from March 30, 1989, until March 31, 1990. The parties stipulated the contract was extended by agreement until April 30, 1990.[1]

At a time when the contract was in effect, December 28, 1989, Company President Chase met with the unit employees.[2] The date of the meeting and those in attendance are not in dispute;[3] however, there is sharp dispute regarding what Chase may have said to the employees during the meeting.

Union Assistant Business Agent Seth Hays[4] testified he went to the plant on December 28, intending to discuss grievances with Company representatives but was met at the door by Company President Chase who told him he (Chase) was going to meet with the employees and that Hays could attend if he wished. Hays attended the meeting and testified:

> [Chase] started out the meeting talking about how the Company had done the past few months. Then he started in on the Union, how poor representation the people were getting. That the Business Agent wasn't representing them right. He stated that he wasn't going to deal with me or anybody in the Local. He was telling the

[1] Although not stipulated to, Company President Charles Chase testified, and his testimony on this point was not refuted, that the parties agreed to a second extension of the contract until May 31, 1990. No further extensions were agreed to.

[2] In the collective-bargaining agreement, the Company recognized the Union as the exclusive representative of its employees in the following appropriate unit:

> All production and maintenance employees, including warehouse employees, truck drivers and truck drivers helpers, employed by the Company at its Savannah, Georgia, facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

[3] President Chase, Production Manager James Reason, and Plant Manager Terry Vasterling were present for the Company along with approximately 25 employees, one of which was Union Job Steward Willie Alexander.

[4] Hays' name is spelled more than one way in the record, however, it is believed the correct spelling is as reflected herein.

> people that they could deal with him on a one on one basis and he could put money back into the Company or that he'd shut the plant down. That he wasn't going to deal with the Union and he kept on saying that through out his say while he was up there talking. And he really—what he tried to do was humiliate me and the Local that represented and the job steward, Willie Alexander.
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> . . . .
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> He had mentioned that they were looking at a place in South Carolina but they wouldn't going to be able to do that as long as the Union was around.

Hays stated that after Chase spoke, he was allowed to address the employees. Hays testified he ''briefly'' told the employees he had been doing a good job and reminded them that since the Union had been at the Company the employees had obtained ''seniority rights,'' ''higher wages,'' ''extra benefits,'' ''vacations,'' and he had been around to take care of their problems. Hays said he told the employees, ''You know, if you all could deal with this person on a one on one basis, I wouldn't be here today.'' Hays testified that when he finished speaking, he asked Company President Chase if he had anything further to say. Hays said Chase answered, ''No, I don't have anything to say with you or to anybody involved with the local.''

Fifteen-year employee, Job Steward Alexander, testified about the meeting:

> [Chase] opened up the meeting saying . . . he was not going to deal with those two individuals over there, Hays and Alexander, because they are not representing the people right in the Union. He told them that he was not going to deal with the Union. The employees could deal with me on a one on one basis . . . he said that he wasn't going to put any money in this plant to work on some of the equipment unless we deal with him on a one on one basis. And told the employees, 'You all don't need the Union. You all can do without the Union and I just want to let you all know that and let you hear it coming from me. . . . He say if he couldn't—he wasn't going to have a Union to tell him what to do. And if he couldn't do that, then he would close the plant.

President Chase testified he ''had some reason to be in Savannah between Christmas and New Year's'' and decided to talk to the employees about the new year. Chase said he mentioned his desire to hold such a meeting to Production Manager Reason. Reason told Chase he already had a meeting scheduled for that time with Assistant Business Agent Hays and Job Steward Alexander. Chase instructed Reason to inform Hays of the employee meeting and ask Hays to attend if he wanted to and then after the meeting to address the grievances. According to Chase, Reason was unable to timely contact Hays, so when Hays arrived at the plant, Chase met him outside the facility. Chase told Hays of his meeting with the employees and invited Hays to attend. Chase informed Hays he (Hays) could then meet with Reason on the grievances after the employee meeting had taken place. Hays agreed to attend the meeting. Chase testified he talked about the Company's plan to expand its business and as a result thereof, certain items would be manufactured exclusively in Savannah, Georgia. Chase testified:

> we talked about the fact that we were coming into a new year that as part of that we were shortly going to enter into some Union negotiations about a new contract and I, you know, I said, you know, ladies and gentlemen, you all—you don't—I don't have to tell you that there has been some problems between us and the Union representatives up to this point and some of the things that we are hearing from them are not consistent with some things that we're hearing from you about what you want and I want you to be sure that you meet with your Union people and convey to them what it is that you want them to be negotiating for you, because we are moving forward and, you know, there is the potential for some good things to happen for all of us in the year ahead. At that point one of the employees asked me a question along the lines of, we want more money and I said I understand that. I, you know, but that is something that I can't deal with you directly on, you know, I've got to deal with your Union representatives on that, but let me take this opportunity to make a point that I want to charge more for what we sell, but I'm not who does that, who makes that call, it's our customers. If I get my pricing out of line, they dictate what they are willing to buy a case of bleach from us at and the—what we've got to do is figure out how to make it at that price and less and make a little profit and figure out how to pay you guys what you want to be paid out of that same revenue.

Chase testified some employee ''brought up something'' about the project work that was being performed in the plant. Chase said he reminded the employees that the five items the employees had asked be improved at the plant had either been completed or was in the process of being completed. Chase testified he, however, told the employees, he

> did not appreciate them asking us to make changes and then turn around and file or call OSHA and complain about those same issues and that I did not feel like that their Union Steward who was involved in the OSHA tour pointing out to OSHA a problem with some leaking caustic pumps that he had never reported to management was conducive to the Company moving forward and, you know, and to a good future and that sort of thing and that I expected that Willie [Alexander] and everybody else there that if they knew that there was a problem, that they report that to management and give us a chance to, you know, attend to it.

Chase further testified:

> At some point in the conversation I made the statement that if we did not work together as a group to meet competitive market demand on prices and product quality and that sort of thing that the market would put us out of business and that it was important that the employees understand that as well as management and that we work together in that regard. Well, that's when [Assistant Business Agent] Seth [Hays] jumped up and said, are you threatening to close the plant and I said no, sir, I am not. I am trying to explain what is going

on in our business, so everybody understands where we are heading and why it's important that we work together with some amount of harmony.

Chase testified Hays tried to interrupt him another time or two during his speech but he told Hays to hold off until he finished. Chase said that after he had finished his speech, he allowed Hays to address the employees. He said that after Hays spoke, he (Hays) left without meeting with Production Manager Reason on the pending grievances.

Production Manager Reason denied President Chase made any derogatory or disparaging remarks about Assistant Business Agent Hays or Job Steward Alexander at the December 28, 1989, employee meeting or that he said he would refuse to deal with them. Reason testified he believed Hays ''misinterpreted'' something President Chase said and that as a result thereof, Hays in an ''outburst'' asked Chase if he was saying he was going to close the plant. Reason testified, ''[Chase] answered [Hays] directly and said no, that was not what he was saying'' and then added ''but everybody needed to work together as a unit to accomplish the task that was before us as a Company.'' Reason denied that Chase threatened to move the Savannah, Georgia operation to some other location.

It is necessary to resolve the conflicts regarding what was said at the December 28, 1989 employee meeting in order to shed light on the subsequent contract negotiations and ascertain if the Company entered those negotiations with the intent of bargaining in good faith.

In resolving the conflicts, I am not unmindful that each of the witnesses had, or continues to have, an interest in the outcome of the instant case. Hays' and Reason's interests may no longer be as immediate as Chase's and Alexander's in that Hays is no longer affiliated with the Union and Reason is no longer affiliated with the Company. I have also borne in mind the tendency of witnesses in general to testify as to their impressions or interpretations of what was said rather than attempting to give a verbatim account of what was actually said. Additionally, I am mindful that in general, persons testifying about their own remarks may well tend to express what they said or intended to say in clearer and more explicit language than they actually used when speaking.[5]

I credit Job Steward Alexander's version of the December 28 meeting. Although he was not a sophisticated witness, his sincerity and overall demeanor persuades me he testified truthfully. His testimony in essential parts was corroborated by that of Assistant Business Agent Hays. Based on Alexander's credited testimony, as supported by Hays, I find President Chase told employees of his dissatisfaction with the Union in general and Alexander's and Hays' representational activities in particular. I further find, based on Alexander's credited testimony, that Chase told the employees he would rather work with them on a one-on-one basis without the Union and that if he could not do that, he would close the plant. Further, based on Alexander's credited testimony, I find Chase told the employees they did not need, and/or could do without, the Union and that he just wanted them to hear that coming from him.

I shall next examine what took place at the four negotiating sessions held in 1990.

B. *The Four Bargaining Sessions*

The parties stipulated they participated in a total of four bargaining sessions, all of which were held at the Marriott Courtyard Hotel in Savannah, Georgia. The dates of the meetings were February 26, March 21, April 16, and May 4, 1990. Present for the Union at each of the meetings were Union trustee Lamar Mathis, Assistant Business Agent Hays, and job Steward Alexander. Present for the Company at each of the sessions were Production Manager Reason, Acting Plant Manager Donald F. McGowan, and Administrative Manager Annette Cutchens.[6] Cutchens took notes at all except the February 26 meeting. All who participated in the negotiations testified Cutchens notes of the meetings were reasonably accurate.

1. The February 26 negotiating session

The February 26 meeting took place in the motel lobby. Union Trustee Mathis testified the Union had expected that the Company would have arranged for a room for the negotiations but had not. Both sides exchanged proposals at this first meeting which lasted approximately 45 minutes.[7] Alexander testified Reason told Mathis, he wanted him to take the Company's proposal ''back to your membership and ratify it.'' According to Alexander, Mathis said contracts were not negotiated in that manner and asked Reason if he had ever participated in negotiations before. Reason told Mathis he had not[8] but added, ''this is the way the management of Coastal Chemical is going . . . to negotiate contracts.''[9] Production Manager Reason recalled that the first bargaining session ''started basically the same way as the rest of them did, personal attacks on individuals . . . very intimidating, very hostile.'' Reason said Mathis was upset throughout the meeting because it took place in the lobby instead of a meeting room. Reason testified Mathis complained this was not the way negotiations were to be conducted and added he did not ''want this to turn into a training session'' and stated ''we're going to have to teach you what we are supposed to be doing.''[10] The parties agreed to meet again on March 8, 1990.

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[5] Although I will not, in the course of this Decision, aver to all the evidence, it has been weighed and considered, and to the extent testimony and other evidence not mentioned herein might appear to contradict my findings of fact, it has been rejected as incredible, lacking in probative worth, surplusage, or irrelevant. In those instances where I may not have specifically detailed who I have credited, it is clear from the narrative who has been credited.

[6] Company President Chase said he selected the Company's negotiating team. He said he chose Reason because he was the ''operations manager''; McGowan because ''he was the man in charge of the Savannah plant''; and Cutchens because she had ''a background of taking notes on Board meetings.''

[7] It appears there was a somewhat heated exchange between the two sides over an incident that had taken place earlier at the plant involving McGowan and Alexander. Although Union Trustee Mathis testified most of the first bargaining session was taken up on that matter, I do not find the incident sufficiently related to the issues herein to set it forth.

[8] Reason testified he lacked experience and was ''green'' as a negotiator and that ''it showed.''

[9] Union Trustee Mathis, in essential part, corroborated Alexander's testimony as outlined above regarding the first bargaining session.

[10] Administrative Manager Cutchens described Union Trustee Mathis as ''having an aggressive and intimidating style.'' She said he tried to ''come on like real strong, forceful, and . . . to take control and have meetings go exactly as he wanted the meetings to go.'' Cutchens, however, testified she did not feel ''threatened or anything'' by Mathis' style because she ''saw through it.''

2. The March 21 negotiating session

The second bargaining session[11] as noted, took place on March 21.[12] The session opened with Union Trustee Mathis expressing irritation that the March 8 scheduled negotiating session had been cancelled at the last minute.[13] Mathis complained the cancellation had not been handled in a ''courteous manner'' and questioned whether Production Manager Reason actually had a death in his family.[14] Reason apologized for the last-minute cancellation.

Production Manager Reason inquired of Mathis if he had read the Company's proposal and if the Union was ready to proceed. Mathis indicated he had not read through the Company's proposal although the other two union negotiators had. Mathis asked if the Company would accept the Union's proposal and Reason said it would not. Mathis asked to review the Union's proposal article by article and discuss any differences the parties had. Mathis questioned whether the Company was negotiating in good faith and pointed out they were obligated to at least discuss their differences in an attempt to arrive at a new collective-bargaining agreement. Administrative Manager Cutchens told Mathis the Company had spent a ''considerable'' amount of time on its proposal and it was presented in good faith. When asked if there was any part of the Company's proposal that was unacceptable, Mathis again responded he wanted to review the Union's proposal article by article and discuss changes from that point. Cutchens asked if the Union needed clarification on any items in the Company's proposal. At that point Union Job Steward Alexander pointed out the Company had only proposed wage reviews for ''maintenance and blowmold employees'' and stated that was unacceptable. Mathis said there was no way the Union could accept pay cuts for some of the employees. The Union accepted article I of the Company's proposal which was the recognition clause. Mathis asked why the Company wished to change article II which dealt with the probationary period changing it from 30 to 90 days. Production Manager Reason said additional time was needed to properly train employees. Mathis expressed concern that a 90-day probationary period was unreasonable but indicated the Union would accept a 60-day period. The Company rejected the Union's counteroffer. Mathis then asked why the Company would not accept the changes proposed in the check off provisions of the Union's proposal which called for, among other things, a credit union type checkoff. Cutchens said the Company was not willing to deal with a credit union at that time. Reason asked if the Union was ready to accept the Company's proposal and if it would take it to its membership for a vote.[15] Mathis told Reason he would do everything he could to be fair to the employees but that he would recommend the membership reject the Company's proposal. Reason wanted to know what parts of the proposal were unacceptable. Mathis complained the Company was not prepared or willing to discuss proposed changes to the existing contract and told the Company they should at least be willing to provide their reasons for rejecting the changes proposed by the Union. Mathis told the Company the Union's proposals were not ''carved in stone'' and asked the Company what portions of the Union's proposal were unacceptable to the Company. Mathis informed Reason the Union ''would accept any items which had not been changed, which would cover about 80 percent of the contract'' and again accused the Company of not negotiating in good faith. Company Administrative Manager Cutchens reiterated that the Company had presented its proposal in good faith. Mathis argued the Company had to make the Union understand its reasons for its positions on each of the articles in its proposal and the Union had to do likewise on its proposal. Mathis again complained the Company did not understand the negotiating process. The Union asked if the Company would agree to extend the contract on a day-to- day basis. The Company agreed to meet again the following week after the Union had further reviewed the Company's proposal and/or had submitted it to its membership. The meeting ended with Union Trustee Mathis being given time to review his schedule to select a date for the next bargaining session.

3. The April 16 negotiating session

The third negotiating session held on April 16, opened with the Union's negotiators indicating they wanted ''janitors'' included in the bargaining unit. The Union next asked the Company to go through each article of the proposals and indicate agreement or disagreement therewith. Union Trustee Mathis accused the Company of playing games with the negotiations and stated he was ready to ''bust . . . ass'' and use any means at his disposal to legally do so. The Company agreed to discuss each article of the proposals but stated bargaining did not necessarily mean compromising in the middle of the two proposals. The Union complained that the Company's asking it to take the Company's proposal to the union membership without any changes did not constitute acceptable bargaining.

After the above exchanges, the parties proceeded through the two proposals, article by article, working primarily from the Company's proposal.

On article I ''Recognition'' the Union wanted to include ''janitors'' but no agreement was reached to do so. On article II ''Probationary Period'' the Company continued to insist on a 90-day period which the Union felt was unreasonable and sought to continue to have a 30-day period. No agreement was reached on this article. On article III ''Checkoff'' the Company indicated it was unwilling to ''lock in'' on credit union deductions and also rejected the Union's request for payroll deductions for the Union's ''political fund.'' On article IV ''Job Stewards'' the Company proposed stewards ''could not solve'' problems on company time. The Union contended such was unheard of and accused the Company of attempting to get the Union out of the plant. No agreement was arrive at on this article. No changes were proposed with respect to article V ''No Individual Agreements'' and as such the language was accepted. With respect to article VI ''Break Periods'' the Company proposed the 15-

[11] The facts set forth for this session are, unless otherwise indicated, based on Cutchens' notes.

[12] The tentative date of March 8, 1990, had to be rescheduled because of a death in Production Manager Reason's family.

[13] It appears Mathis flew from Atlanta to Savannah, Georgia, on the morning of March 8, 1990, unaware the meeting had been canceled.

[14] Mathis testified without direct contradiction that his office determined between March 8 and 21, 1990, Reason's mother-in-law had died but that she had been buried on March 6, 1990, and that Production Manager Reason had spent the entire workday of March 8, 1990, at the Company's Hampton, Georgia facility.

[15] Mathis specifically testified Reason wanted them ''to take [the Company's proposal] in total, back to the membership for a vote.''

minute break periods were just that whereas the Union argued the employees should be able to leave their work stations on their own time but that they should be permitted to return from breaks on company time. The Union agreed to accept the Company's position on break times. No changes were proposed for articles VII ''Non-Discrimination'' and VIII ''No-Strike, No Lockout'' therefore the language for those articles was accepted.

The parties discussed article IX ''Seniority'' by subsection. No change was proposed for subsection 1 related to a company seniority list being available to employees upon request. No changes were proposed on subsection 2, related to filling permanent vacancies, and subsection 3, related to a lack of qualified employees to fill vacancies. On subsection 4 related to layoff, the Union wanted the sentence ''ability, skill, and seniority'' covering layoffs and recalls to be changed so that seniority would be first with ability and skill following thereafter.[16] Production Manager Reason agreed to that arrangement of the words.[17] On subsection 5 related to when seniority would be broken, the Company wanted, as one basis, when an employee was absent for 3 months or more due to a bona fide illness, accident, or layoff. The Union objected urging more time than 3 months was needed. On subsection 6, the Company wanted overtime to be allocated based on seniority among employees permanently assigned to the classification and department where overtime was needed. The Union objected based on the fact the Company did not have employees permanently assigned to positions by departments. The Union proposed a subsection 7 outlining employees' rights in the event particular jobs were eliminated by the Company. The Company rejected such a subsection and the Union complained the Company was attempting to penalize employees with many years service. No agreement was reached on this article.

On article X ''Hours of Work'' the Union wanted the normal work week to be five consecutive 8-hour days whereas the Company proposed 4 consecutive 10-hour days. The Union sought to have meal allowances added when employees were required to work 12 or more hours in a given day. No agreement was reached on this article.

The parties proposed no language changes for article XI ''Supervisors Working'' thus, the language was accepted. The parties agreed to defer discussing article XII ''Classifications and Rates of Pay.''

On article XIII ''Truck Drivers'' the Company indicated it intended to eliminate its transportation department. The parties deferred further discussion thereon. The parties also deferred discussing articles XIV ''Holidays,''[18] XV ''Vacations,''[19] and XVI ''Health and Welfare.''

The Union sought information regarding changes in investments contained in article XVII ''Profit Sharing.'' When Administrative Manager Cutchens told the Union the moneys involved were invested in various funds, the Union passed on this article. There were no language changes in article XVIII ''Pregnancy Leave'' and article XIX ''Jury Duty'' thus, the language was accepted. On article XX ''Funeral Leave'' the Union sought to have grandchildren included in the definition of an employee's immediate family but agreed to the Company's proposal which did not include grandchildren.

There were no proposed language changes for articles XXI ''Paydays'' and XXII ''Safety'' accordingly, the language for those articles was accepted. The record does not reflect the parties' positions on article XXIII ''Personal Protective Equipment'' except that Union Trustee Mathis noted the Company had dropped from prior language the sentence ''No employee shall be required to wear a uniform that does not bear the union label.'' No language change was proposed for article XXIV ''Examination and Identification Fees'' thus, the proposed language was accepted. On article XXV ''Absence'' the Union wanted the Company to explain its proposal to eliminate prior language covering time off for union activity while only retaining the provision related to absences in general. The Company advised it did not have enough personnel to cover that type absences so it was proposing to eliminate it. On article XXVI ''Discharge and Discipline'' the Union proposed a progressive disciplinary policy but agreed to the Company's proposed language. On article XXVII ''Subcontracting'' the Company proposed eliminating from prior language the sentence ''the Employer agrees that no work or service presently performed by the collective bargaining unit will be subcontracted for the purpose of circumventing the terms and provisions of this agreement.'' The Union argued eliminating that sentence destroyed the article in that employees needed to plan ahead with some degree of security. The Company asserted it needed the ability to delete functions as it saw fit. No agreement was arrived at on this article.

On article XXVIII ''Grievance Procedure'' the Union agreed to the Company's proposal that the losing party would pay the arbitrator's fee. The Company proposed that the loser also pay attorney fees. The Union liked the idea. This article was left open for the Union to advise the Company if it would accept the Company's full proposal as written. On article XXIX ''Access to Company Property'' the Company proposed changing the prior language that allowed union representatives access to company property during business hours and took the position that assistant business agents could ''only come to the plant for follow-up of grievances.'' No agreement was arrived at on this article. There were no proposed changes for articles XXX ''Union Liability,'' XXXI ''Posting,'' XXXII ''Reopening Clause,'' XXXIII ''Separability and Savings,'' XXXIV ''Management Rights,'' and XXXV ''Sick Pay'' therefore the language of these articles was accepted by the parties. On article XXXVI ''Duration of the Agreement'' the record only reflects the parties considered the article to be pending.

The bargaining session ended with Union Trustee Mathis needing to ''catch a plane'' out of the city.

[16] Union Trustee Mathis testified this was the only thing the Company agreed to in all the negotiations.

[17] Production Manager Reason testified he could only recall making one change during negotiations and said that involved changing the order of words from ability, skill, and seniority to seniority, ability, and skill in article IX of the Company's proposal. Reason also acknowledged he had stated in his pretrial Board affidavit ''that aside from one minor and one inconsequential change the Company did not deviate from its initial proposal.''

[18] Near the end of the bargaining session, Union Trustee Mathis wanted to know why the Company wished to replace Martin Luther King's birthday with President's Day as a holiday. Production Manager Reason indicated it was to make the Company's holiday schedules uniform throughout. No agreement was reached on holidays.

[19] At the end of the bargaining session, Union Trustee Mathis complained that the Company was, by its proposal on vacations, attempting to take away a week's vacation from its more senior employees and asserted such was unfair. No agreement was reached on vacations.

4. The May 4 negotiating session

The final negotiating session held on May 4, 1990, opened with Production Manager Reason giving a prepared statement on what the Company intended to accomplish. Reason said the Company's new management was ''a hands on style'' that differed greatly from their predecessors. He asserted the new management had nothing to do with the old contract and needed a contract that allowed ''forward motion'' for the Company. Reason said the Company's proposal would reduce cost by increasing efficiency and eliminating waste. In that regard, he said the Company was dropping its trucking operation in that it was not large enough to remain competitive. Reason then urged the Union to take the Company's proposal to its membership and obtain a favorable vote thereon.

The Union (Mathis) accused the Company of trying to ''sugar coat'' its proposal with good sounding words but without any real effort to reach an agreement. Mathis accused the Company of not being willing to ''even agree was ''backing up'' in the area of job security and argued the Company was trying to rid itself of its more senior employees by proposing reductions in vacation time, money, and employee rights. The Company responded it was simply attempting to advance ''sound business practices.''

The parties then discussed whether the employees were very efficient and who should bear the responsibility for improving job knowledge. The Company took the position it was the employees' responsibility to improve their job skills while the Union argued the employees already know their jobs. The parties briefly discussed job stewards with the Union taking the position the Company was, by its proposal, limiting visits by stewards thus stripping stewards of their ability to carry out their responsibilities. The Union urged the Company not to seek pay cuts that the problems of the Company were not the employees' fault. The Company accused the Union of attempting to avoid discussing wages. The Union stated it simply would not agree to pay cuts.

The Union asked about a Federal mediator to ''help resolve . . . differences'' and the Company agreed to ''get back'' with the Union on that.

The Union agreed to present the Company's proposal to the unit employees at a scheduled meeting on May 5, 1990, but indicated it would not recommend the proposal because it took benefits away from the employees. The Union agreed to let the Company know on Monday the results of the vote on the Company's proposal. Mathis credibly testified Reason asked where they would go if the membership turned the Company's proposal down. Mathis told Reason he would attempt to set up another meeting with the Company so they could continue to bargain toward an agreement.[20]

C. *The May 5 Vote and Following Actions*

At the union meeting on May 5, 1990, the Company's proposal was overwhelming rejected. The Union leadership was authorized, if necessary, to call a strike.

Production Manager Reason testified Union Trustee Mathis did not contact him on Monday following the Union's vote so he contacted Union steward Alexander. According to Reason, Alexander told him the membership had rejected the proposal and that either Union Trustee Mathis or Assistant Business Agent Hays would be contacting Reason. Reason said he did not hear from Mathis or Hays between May 6 and the time he left his employment with the Company on May 11, 1990.[21]

On May 8, 1990, Assistant Business Agent Hays telephoned Administrative Manager Cutchens about Reason's leaving the Company and asked who would be replacing him. Cutchens told Hays she did not know. Hays advised Cutchens the employees had rejected the Company's proposal. Cutchens said she already knew. Hays told Cutchens he would get in touch with Union Trustee Mathis to arrange another negotiating session.[22]

Approximately mid-May 1990, Union Trustee Mathis and those on and supporting his ''slate'' lost an internal union election.[23] The new union administration took office effective June 1, 1990.

On May 21, 1990, Company President Chase sent the following letter to the Union:

> President
> Teamsters Local Union No. 928
> Weldon L. Mathis Labor Complex
> 2540 Lakewood Ave., S.W.
> Atlanta, GA 30315
>
> Good Morning, Sir,
>
> As you know, our labor agreement expired March 31, 1990. Our mutual agreement to extend the agreement for one month expired the 30th of April, 1990.
>
> At our last meeting on May 4, 1990, the Union indicated they would meet with our employees and advise their intentions the following Monday, May 7th, to date we have heard nothing.
>
> Please advise within two business days the Unions intentions regarding this negotiation.
>
> Sincerely,
>
> /s/ CC
> Chris Chase
> President

On May 30, 1990, Company President Chase again wrote the Union. His letter follows:

> President
> Teamsters Local Union No. 928
> Weldon L. Mathis Labor Complex
> 2540 Lakewood Ave., N.W.
> Atlanta, GA 30315
>
> Dear Sir,
>
> Since we have received no response from you regarding the labor contract which expired on March 31, 1990 we believe we are at an impasse.
>
> It is our intention therefore to begin operating under the contract which we last discussed on May 4, 1990 effective the 1st shift June 1, 1990.

[20] Mathis testified there was no mention made about the Company's proposal being implemented if it was turned down.

[21] Reason's employment, including severance and vacation time, did not actually end until June 5, however, he testified he did not return to work after May 11, 1990.

[22] Cutchens' testimony essentially follows that of Hays except she placed the date as May 14 or 15, 1990.

[23] Mathis credibly testified ''effective June 1, I became unemployed.'' Assistant Business Agent Hays was also replaced.

Sincerely,

/s/ CC
Chris Chase
President

It is undisputed that the Company instituted its contract proposal on June 1, 1990.

On June 1, 1990, President Chase again wrote the Union. His letter follows:

President
Teamsters Local Union No. 928
Weldon L. Mathis Labor Complex
2540 Lakewood Ave., S.W.
Atlanta, GA 30315
To insure, Sir,

that we're all singing from the same song book, I've enclosed a copy of our last contract offer.

As you know from prior notices, effective June 1, 1990, we are operating under this agreement and our employees have been notified.

If you have any questions please feel free to call.

Sincerely,

/s/ Chris Chase (lac)
Chris Chase
President

On June 2, 1990, Assistant Business Agent Gregory Charron[24] ''faxed'' the following letter to Company President Chase:

Mr. Chris Chase
President
Coastal Chemical Company VIA FAX
P. O. Box 456
Hampton, Georgia 30228

Greetings:

Please be advised that I have been selected as Business Agent for the above Union which represents the employees of Coastal Chemical Company. I am in receipt of your letter dated May 30, 1990, in which you state that an impasse has been reached with the Union and that the Union has failed to respond to your May 4, 1990 contract proposal.

You are incorrect in a number of respects. It is the Union's position that no impasse has been reached in bargaining. Further, Seth Hays, who is my predecessor, contacted Annette Cutchens following our May 4, 1990 bargaining session and advised her that the workers had turned down the Company's most recent contract offer. Mr. Hays advised her that the Union desired to continue negotiations with the Company. Ms. Cutchens stated the Jim Reason, who had previously been the Company's spokesman in bargaining, was no longer with the Company and she did not know at that time who would be handling the negotiations, but that someone would contact Mr. Hays to set up another meeting. No one has ever contacted us for that purpose.

The workers have advised us that you have unilaterally implemented changes in their wages and working conditions. This conduct is unlawful and constitutes a violation of Section 8(a)(5) of the National Labor Relations Act. Accordingly, we demand that you rescind your unilateral changes and that you contact me so we can continue negotiations.

Sincerely,

/s/ Gregory Charron
Gregory Charron
B.A., Teamsters Local Union No. 928

On June 5, 1990, Assistant Business Agents Charron and Freddie Thomas visited the Company unannounced to introduce themselves as the new union representatives. Charron and Thomas met with Company President Chase and Acting Plant Manager McGowan. Charron presented Chase a letter of introduction prepared by new Local Union President Donald Scott.[25] Chase gave Charron and Thomas a tour of the plant and then, according to Charron, asked for an off-the-record discussion. Charron testified they talked about resuming bargaining. Charron said Chase talked about a training program he wanted to start for the employees and he told Chase this was one of the things they needed to get back to the bargaining table to discuss. Charron advised Chase he did not have authority to make changes on the spot, that such would have to be accomplished at the bargaining table. Charron said Chase referred to the new contract in their discussions and that he corrected Chase each time telling him it was the Company's proposal that no new agreement had been arrived at. Chase told Charron that if they went back to the bargaining table, he would make everything retroactive to June 1, 1990, and asked if that was agreeable to Charron. Charron told Chase he could not agree to that but would take matters of that sort up with officials of the Union. Charron testified Chase specifically agreed to return to bargaining and even agreed to arrange and pay for a location to meet. Charron said he told Chase that would be a good first step that ''At least we're back talking again.'' ''We're back to square one, that's where we need to get back to.'' Charron told Chase he did not know what had happened in the past but added they needed to work together and accomplish their goals. Chase agreed and said he would call Charron with further details on a location for their meeting. Charron said Chase advised them he was meeting with the employees that afternoon and was going ''to change some shifts or add some shifts'' and ''tell them about the contract.'' Charron said he again corrected Chase and said ''proposals.'' Chase continued to insist ''I've got a contract.'' Charron told Chase:

> No, it's proposals, Mr. Chase. We need to start off on square one. Let's start off on the right foot. Let's put everything back and start off again.

Charron testified Chase said he could not agree to that, that he would lose face with his employees.[26]

Company President Chase viewed the June 5 meeting somewhat differently. He testified:

[24] The Union's new administration chose Charron to replace former Assistant Business Agent Hays effective June 1, 1990.

[25] The letter identified Charron as an agent of the Union and listed various other agents who, from time to time, might have dealings with the Company.

[26] Charron specifically denied agreeing to allow Chase to continue implementing the Company's proposal asserting he did not have the authority to do so.

> I told him . . . we have gone through a pretty tough time with your predecessors. We feel like we are at impasse and we intend to operate under the contract that was put into effect June 1 going forward. I don't have a problem meeting with you and in talking to you about issues and if we agree to make some changes, I personally do not have a problem with doing that, but I'm not going to further confuse our employees and make another change in the interim.

When asked if Charron said anything at that point, Chase testified:

> My recollection is that he agreed that we had had a productive meeting, that he was looking forward to working with us and resolving some of the issues on an on-going basis and, you know, there may have been some other platitudes or whatever, but he left shortly thereafter.

Chase testified Charron did not disagree with his statements.

On June 6, 1990, Charron wrote Chase regarding a location for their June 19, 1990 meeting. Company President Chase replied to Charron's letter on June 8, 1990. In his reply, Chase again contended the parties were at impasse but acknowledged he had agreed to meet and ''bargain regarding our labor agreement'' but that he planned to continue operating under the Company's proposal that had been implemented on June 1, 1990. Chase asserted in his reply that Charron had agreed to that arrangement. Chase also asserted he and Charron had spoken on the telephone on June 7, 1990, and that Charron had informed him the Union's attorney was not amenable to their agreement ''regarding operating under this new agreement'' or to ''withhold filing an unfair labor practice'' charge. Chase wrote ''if this is the case, I am not willing to schedule another bargaining session.'' In closing his letter, Chase again emphasized he was ''not about to agree to bargain with the union with an unfair labor practice charge filed against the Company'' and concluded ''If you want to meet on the 19th of June, please acknowledge in writing that what we've agreed to is acceptable.''

Charron replied to Chase's June 8 letter that same day. Charron asserted the only thing he had agreed to was to meet on June 19, 1990, and that he still desired to do so.

Union Assistant Business Agent Charron testified Company President Chase telephoned him on or about June 11, 1990, and indicated he was glad they had met on June 5, and stated he thought they could work together. Chase asked Charron if he had talked with ''his people'' about the Company agreeing to make retroactive to June 1, 1990, any understandings they might reach but keeping the new contract in effect. Charron told Chase the Union could not agree to that and said they needed to get back to the bargaining table. According to Charron, Chase said the Company's attorney had informed him the Union's attorney had said if the Company implemented its proposal without going through the Union, the Union would file unfair labor practice charges against the Company. Charron stated Chase said if the Union withdrew the charges, he would meet on June 19, but if they did not he would not. Chase asked Charron to check it out with his attorney and added:

> If we couldn't get together on this thing and if they didn't drop the charges . . . to hell with it . . . I'll just shut the damn place down, people don't work anyway and I'll move it to Florida or North Carolina and then he said you write me a letter telling me, if you will or if you won't agree to my proposals and I said I sent you a letter and he hung up on me.

Company President Chase testified that after his June 5, 1990 meeting with Charron, he received a telephone call from his attorney that the Union's new attorneys were threatening to file unfair labor practice charges against the Company. Chase said he felt the left hand at the Union did not know what the right hand was doing so he telephoned Charron. In the call, Chase said he and Charron tentatively agreed to meet on June 19, and added nothing was said about the interim because he and Charron had already agreed how things would operate during that time. Chase testified he thereafter telephoned Charron confirming that the Company had obtained a meeting place and he asserts Charron told him the Union's attorneys had advised him that if the Company did not go back to the original contract and negotiate therefrom, the Union was going to proceed with its unfair labor practice charges against the Company. Chase said he told Charron ''that's not our deal and I'm not going to agree to a bargaining session, if that's your position.'' According to Chase, Charron said he had tried to change his attorneys' position but without success. Chase said he reminded Charron he had 6 months to file unfair labor practice charges, and urged the Union to go back to the negotiating table and if the Company did not deal with them straight up, then the Union could file charges. Chase said he warned Charron ''I'm not going to go in the bargaining on a good faith basis with a charge filed and over my head.'' Chase asserts Charron said he would take Chase's suggestions back to ''his people'' and hung up the phone.

Thereafter on June 15, Charron ''faxed'' a letter to Chase confirming their scheduled June 19, 1990 bargaining session. Chase responded by writing at the top of Charron's letter ''Cancelled until you confirm in writing our last conversation is agreeable'' and faxed his response back to Charron on June 16, 1990.

I credit Charron's account of his exchanges with Chase. Charron's manner of and bearing while testifying leads me to believe he did so truthfully. His assertion that no agreement other than to return to the bargaining table was arrived at in his discussions with Chase was, in part, supported by the testimony of Job Steward Alexander. Alexander testified Chase spoke with him on June 5, 1990, telling him he had met with Assistant Business Agents Charron and Thomas that day, and they seemed a great deal different from their predecessors, Hays and Mathis. Alexander credibly testified Chase told him Charron and Thomas had agreed to some changes the Company wanted. When Alexander told Chase he would have to telephone Charron to see what had been agreed to Chase replied:

> ''Well, they didn't really agree. Only thing is we agree to meet on June 19th. We set that date, June 19th, 1990, for getting back to the bargaining table.'' He said, ''I told Mr. Charron and Mr. Thomas that if we can settle on monetary reasons that I will backpay from

> June 1, 1990. I'm not going to go back until March 31st.''

Alexander said Chase told him:

> ''I want you to understand,'' he say, ''and I want to let you know what is going on. I have met with them today and if we can come up with a contract, then I will pay back wages for what I'm instituting on June 1st. Mr. Charron said that we don't have a contract, that's a proposal, but I'm going forward with this contract what's in force. I'm not going to change that.''

Additionally, the comments Charron attributed to Chase about closing the plant and moving it out of state are in keeping with other comments of that nature made by Chase.

D. *The Drug Testing Policy*

Company Administrative Manager Cutchens testified that in early 1989, the Company implemented a preemployment drug screening policy. She stated each employee hired on and after February 1989 was required to take a preemployment drug test with employment contingent thereon.[27] She testified this preemployment drug testing policy never came up during negotiations for or after the Company and Union had arrived at their March 1989 collective-bargaining agreement. Cutchens further testified that prior to August 1990, the Company had no drug testing policy related to employees already employed who were injured on the job.[28]

Company President Chase acknowledged there was no notice given to, or consultation with, the Union on its latest drug testing policy. The Company issued the following to all employees:

MEMO

To: All Employees
From: Safety Committee
Subject: Drug Testing
Date: August 21, 1990

> Coastal Chemical Co. is committed to providing a safe, healthy and drug free work place for its employees.
>
> In an effort to help control and reduce the number of work related injuries the following policy will be effective August 24, 1990.
>
> Any employee injured on the job and requiring professional medical treatment will be required to submit to a drug test at the time of treatment for the injury.
>
> Any employee found to be under the influence of non prescribed drugs or alcohol will be terminated from employment with Coastal Chemical Co.

Chase testified the Company had the right to issue the above memorandum based on articles XXIV and XVI of the expired collective-bargaining agreement.[29]

Article XXIV ''Examination and Identification Fees'' reads in part, ''The Company may furnish yearly physical examinations to each employee working in a department that may be hazardous to the employee's health.'' Article XVI ''Discharge and Suspension'' reads in part ''No warning notice need be given to an employee before discharge if the cause of such discharge is . . . being under the influence of alcohol while on duty or use of narcotics.''

E. *Analysis, Discussion, and Conclusions*

1. Impasse principles

It is settled Board law that an impasse occurs ''after good faith negotiations have exhausted the prospects of concluding an agreement.'' *Taft Broadcasting Co.*, 163 NLRB 475 at 478 (1967), enfd. sub nom. *Television & Radio Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Stated differently, the Board has defined impasse ''as a state of bargaining at which the party asserting its existence is warranted in assuming that further bargaining would be futile.'' *E. I. du Pont & Co.*, 268 NLRB 1075 (1984). The Board in *Taft Broadcasting Co*., supra, set forth relevant factors to be considered in deciding whether an impasse in bargaining existed:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are factors to be considered in deciding whether an impasse in bargaining existed.

Insistence to impasse is available to a party only with respect to mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). To insist to impasse on permissive subjects of bargaining constitutes bad faith bargaining that violates the Act. ''Employer-implemented changes in terms and conditions of employment consistent with preimpasse proposals may be unilaterally instituted only after an impasse has occurred.'' *Sacramento Union*, 291 NLRB 552 (1988). Stated differently, an employer does not violate Section 8(a)(5) of the Act by making unilateral changes, as long as the changes are reasonably encompassed by the employer's preimpasse proposals. *NLRB v. Katz*, 369 U.S. 736 at 745 (1962). The Board in *E. I. du Pont & Co.*, supra, noted:

> Finally, there need be no undue reluctance to find that an impasse existed. Its occurrence ''cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all his proposals will be readily and completely accepted.'' *Hi-Way Billboards*, 206 NLRB 22, 23 (1973).

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[27] Acting Plant Manager McGowan testified he took a preemployment drug test. Company President Chase and Production Manager Reason testified about an existing preemployment drug testing policy.

[28] Company President Chase and Production Manager Reason corroborated Cutchens' testimony on this point.

[29] Chase testified art. XXIV of the expired agreement was identical to art. XXIV of the Company's proposal. He testified there were only minor differences between article XVI in the expired agreement and the Company's proposal.

2. Did impasse occur?

The main thrust of this case turns on whether a lawful impasse existed on June 1, 1990. The answer to that question determines whether the Company legally implemented its contract proposal on or about that date. For the reasons set forth below, I find no valid impasse existed at that time.[30]

The bargaining history shows that at the time the Company claimed impasse (without specifically identifying what items it contended the parties were at impasse on)[31] the parties had held only four bargaining sessions. The first bargaining session was nothing more than a brief meeting in a motel lobby at which the parties exchanged proposals (as well as some unpleasantries) without any substantive bargaining taking place. At the second bargaining session the parties spent a portion of the session questioning each other motives and desires. At the second session, the Company was more concerned with having the Union present its entire proposal to the employees without change that it was in negotiating through the various articles of the two proposals. The parties discussed, and the Company later agreed, to extend the expiring contract for 30 days. At the conclusion of the second negotiating session, the parties had not, with few exceptions (probationary period and unit composition), negotiated on any substantial issues. At the third negotiating session the parties for the first (and only time) proceeded through the proposals (primarily working from the Company's proposal) article by article. As noted above, the parties accepted those articles in which there had been no language changes proposed. Only by movement on the Union's part did the parties reach agreement on certain other articles—which articles have been identified above. It is important to note that the parties deferred discussing core economic issues at the third session. The fourth and final session opened with the Company, through its chief negotiator, engaging in some specific prepared posturing. Very little else occurred at this final session beyond sparring and posturing except the Union agreed to present the Company's proposal to the employees for a vote the following day. As of the conclusion of all four negotiating sessions, neither party, particularly the Company, could reasonably have believed that impasse had occurred. Clearly the Company did not believe so because its chief negotiator, Production Manager Reason, wanted to know what happened if the employees rejected the Company's proposal and he was told the parties would return to the bargaining table for more negotiations. The evidence fails to demonstrate that either party indicated either expressly or by implication that impasse was imminent. Nothing was ever said to the effect that if the employees rejected the Company's proposal the Company would implement its proposal. At the conclusion of the four bargaining sessions, the parties had yet to bargain over core economic issues. There was no acknowledgement by either party that further bargaining would be futile. Thus based on the bargaining history, it is clear no impasse existed as of May 4 or June 1, 1990.

I note very little time had actually been spent in negotiations. The length of the longest (April 16, 1990) bargaining session was only approximately 5 hours (11 a.m. to 3:50 p.m.). Thus the limited time devoted to bargaining coupled with the critical issues still outstanding and a lack of any expressed or implied indication of impasse persuades me the parties had not, and understood they had not, reached the point where further bargaining would be futile.

The mind set with which the Company enter negotiations is a factor that strongly indicates no legal impasse existed. Stated differently, the Company did not, in my opinion, enter or participate in the bargaining in good faith.[32] Company President Chase announced to all unit employees on or about December 28, 1989, that ''he wasn't going to deal with the Union . . . .'' He also told the employees ''they could deal with him on a one-on-one basis and he could put money back into the Company or that he'd shut the plant down.'' He also told the employees ''he wasn't going to put any money in this plant to work on some of the equipment unless [we] deal with him on a one on one basis . . . he wasn't going to have a Union tell him what to do . . . if he couldn't do that, then he would close the plant.'' I note it was Chase who selected the Company's negotiating team and his personally selected team only agreed to one change in the negotiations which change involved switching around the words ability, skill, and seniority to seniority, ability, and skill.[33] At the very beginning of bargaining, the Company wanted the Union to take its proposal, without any modification to the employees for acceptance. It appears the Company was simply pretending to bargain with the Union in order to carry out President Chase's desire not to deal with this Union. The Company's bargaining was at best superficial. There was no impasse in bargaining as of May 4 or June 1, 1990, because there had been no valid attempt at the give-and-take in negotiations that is necessary to precede an impasse.

At the time the Company declared the parties were at impasse, issues remained unresolved, not necessarily, I am persuaded out of disagreement, but because the parties had not yet really discussed them. For example, the parties had deferred consideration of and had not discussed in any detail classification and rates of pay, holidays, vacations, and health and welfare benefits.

Clearly there was no valid understanding by the parties that they were at impasse. Company President Chase's letter of May 21, 1990, that the Company had not heard from the Union on the employees' reaction to its proposal and/or the status of negotiations simply was not accurate. Production Manager Reason learned from Union steward Alexander in

[30] As is apparent, I have set forth the prenegotiating activities, the negotiating sessions and the postnegotiating activities of the parties in extended detail because I am persuaded such a full and complete overview compels the conclusions arrived at herein.

[31] I note the parties agreed on the prior language covering no individual agreements, nondiscrimination, no strike, no lockout, supervisors working, pregnancy leave, jury duty, paydays, safety, examination and identification fees, union liability, posting, reopening clause, separability and savings clause, management rights, and sick pay. I further note the parties by compromise on the Union's part agreed on funeral leave, break periods, discharge, and suspension, and that the losing party in arbitration would pay the arbitrator's fees.

[32] I rejected the Company's attempt at trial to demonstrate the Union acted in bad faith by wearing leather jackets instead of business suits at one bargaining session and by tape recording one bargaining session without advising the Company it was doing so. I adhere to my trial rulings. I also disallowed evidence about certain alleged vandalism at the plant during negotiations inasmuch as the Company could not demonstrate that the Union or anyone connected with the Union was responsible. I also adhere to my rulings in that regard.

[33] The Company's chief negotiator, Production Manager Reason, acknowledged he described that change in his pretrial Board affidavit as ''minor and inconsequential.''

early May[34] the employees had rejected the Company's proposal inasmuch as he asked Alexander. At that time Alexander told Reason the Union would be in further contact with the Company regarding negotiations. Union Assistant Business Manager Hays learned that Reason was quitting or had already quit his employment with the Company and on or about May 8, 1990, telephoned Administrative Manager Cutchens to find out who would replace Reason as the Company's chief negotiator. Cutchens did not know. Hays told Cutchens the Union, Trustee Mathis in particular, would be in touch with the Company about arranging further bargaining sessions. Approximately mid-May, Mathis was voted out of office but his replacement and the new administration were on the job by June 1, 1990. During that time, however, the parties, Reason, Cutchens, Alexander, and Hays were all anticipating further bargaining. Notwithstanding all the above, Company President Chase on May 30, 1990, declares the parties at impasse and informs the Union the Company will implement its contract proposal effective June 1, 1990. The new union administration responded quickly to President Chase's declaration the parties were at impasse. New Assistant Business Agent Charron in a letter dated June 2, 1990 (via fax) advised Chase his assertion was incorrect that the parties were not at impasse. In Charron's letter, he reminded President Chase that his predecessors had contacted the Company after the employees rejected the Company's proposal about further bargaining sessions. Charron asked Chase to rescind the unilateral changes and contact him so the parties could continue their negotiations. It appears Company President Chase simply tried to seize on the Union's internal personnel changes to declare an impasse when one did not exist. Furthermore, the Union never acquiesced in the Company's assertion the parties were at impasse nor did it ever agree the Company could implement its contract proposal. That the Company, President Chase in particular, was aware that no impasse had been reached and that no agreement had been arrived at to allow the Company to continue operating under its contract proposal is borne out in Chase's comments to Union Steward Alexander that nothing had been agreed to on June 5, except that the parties would return to the bargaining table on June 19, 1990.

3. Conditioning further bargaining on the Union's withdrawing an unfair labor practice charge

Although having agreed in early June to return to the bargaining table on June 19, 1990, Company President Chase advised the Union in writing on June 8, 1990, that he was ''not about to agree to bargain with the Union with an unfair labor charge filed against the Company.'' Chase informed the Union that if it wanted to meet for bargaining on June 19, it would have to ''acknowledge in writing that what we've agreed to is acceptable.'' What Chase contended he and Charron had agreed to was spelled out in Chase's letter—portions of which follow:

> we specifically agreed that we would schedule a meeting for June 19, 1990 at, at 10:00 AM and that I would arrange for a meeting room at Coastal's expense and advise you of same. Further, we agreed that we would operate under the new agreement effective June 1, 1990. That whatever issues we bargained differently at that meeting or subsequent meetings would become effective June 1, 1990.
>
> As noted, Union Assistant Business Agent Charron credibly testified no agreement was arrived at between he and Company President Chase other than to return to the bargaining table. When Chase was again advised on June 11, 1990, while speaking with Charron via telephone that he (Chase) was not going to be able to operate under the Company's proposal he told Charron if they could not get together and drop the unfair labor practice charges ''to hell with it'' he would just ''shut the damn place down'' and move it to Florida or North Carolina. Chase then directed that Charron write him whether the Union would or would not ''agree to [his] proposals'' and hung up the telephone.

By conditioning further bargaining on the Union's acceptance of the unlawfully implemented Company proposal and on the Union's withdrawing its unfair labor practice charge, the Company violated the Act. *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989); *John Wanamaker Philadelphia*, 279 NLRB 1034 (1986).

In summary, I find the parties had not as of June 1, 1990, ''exhausted the prospects of concluding an agreement'' and as such no valid impasse existed. Accordingly, I find the Company violated Section 8(a)(5) and (1) of the Act by implementing its contract proposal on that date, and by conditioning further bargaining on the Union's acceptance of its unlawfully implemented contract proposal as well as conditioning further bargaining on the Union's withdrawing its unfair labor practice charges.

4. The August 21, 1990 drug testing policy

The final issue to be decided is whether the Company violated the Act when on or about August 21, 1990, it implemented a policy that required employees to submit to drug testing when injured on the job. For the reasons set forth below, I find the Company violated the Act as alleged in the complaint.

There is no dispute but that the Company promulgated such a policy on August 21, 1990. It is further undisputed that no such policy had previously existed. It is likewise undisputed that the Company instituted the policy without notice to or bargaining with the Union. Finally, it is undisputed that the Company's contract proposal (reviewed elsewhere in this Decision) did not contain any article directly related to postemployment drug testing.

In light of the above, the only way the Company can escape a finding of a violation of the Act based on its unilateral action is if it was privileged to do so under the terms of the expired collective-bargaining agreement and/or if the Union in some manner waived its right to negotiate that subject matter.

The Company asserts it was privileged to institute its postemployment drug testing policy because it had, for an extended period of time, a preemployment drug testing program. The Company also asserts it was privileged to do so under articles XXIV ''Examination and Identification Fees'' and XXVI ''Discharge and Suspension.'' Under the discharge article the Company could, without a warning notice being given, discharge an employee for cause if the em-

[34] Production Manager Reason left the Company after May 11, 1990.

ployee was under the influence of alcohol or narcotics while on duty. However, nothing in that article addresses whether an employee would be subjected to a medically approved sobriety or drug test/examination. I am persuaded a leap cannot be made from the prior contract language to a privilege on the Company's part to subject its employees to postemployment drug testing without consultation with the employees' representative. Even further removed is the examination article which simply states an employee may be subjected to a physical examination at Company expense if the employee works in a department that may be hazardous to the employee's health. I am persuaded nothing in the above two articles constitutes a waiver of the Union's right to bargain concerning postemployment drug testing. A final question exists regarding whether the Company may unilaterally institute a postemployment drug testing policy, without violating the Act, where it has had and continues to have an unchallenged preemployment drug testing policy? I am persuaded it may not unilaterally institute such a policy without violating the Act. The Board treats pre and postemployment drug testing differently as it relates to bargaining obligations. The Board, in two somewhat recent cases, addressed the differences. In *Johnson-Bateman Co.*, 295 NLRB 180 (1989), the Board found an employer's midcontract unilateral implementation of a drug/alcohol testing program for its already employed employees violated Section 8(a)(5) and (1) of the Act because drug/alcohol testing for already employed employees was a mandatory subject of bargaining. In *Star Tribune*, 295 NLRB 543 (1989), the Board concluded that an employer's unilateral implementation of a drug and alcohol testing policy for job applicants or prospective employees did not violate Section 8(a)(5) and (1) of the Act in that a policy applicable to job applicants or prospective employees was not a mandatory subject of bargaining. Applying the above to the instant case, it is clear the subject of drug testing for already employed employees is a mandatory one. It is clear the Company instituted its postemployment drug testing policy unilaterally. I am persuaded the Union did not waive its statutory right to bargain about this mandatory subject of bargaining by not bargaining or attempting to bargain about the permissive subject of preemployment drug testing. In summary, I find the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its postemployment drug testing policy on or about August 21, 1990.

CONCLUSIONS OF LAW

1. Coastal Chemical Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local 728 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including warehouse employees, truck drivers and truck drivers helpers, employed by the Company at its Savannah, Georgia facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. At all times material, the Union has been the exclusive representative for purposes of collective bargaining of the employees in the above-described appropriate unit within the meaning of Section 9(a) of the Act.

5. By about June 1, 1990, unilaterally implementing its contract proposal, thereby effecting changes in unit employees' wages and terms and conditions of employment, at a time when no impasse in bargaining with the Union had occurred, the Company refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act.

6. By, on or about August 21, 1990, unilaterally instituting and implementing a requirement that employees who require treatment for job related injuries must undergo a drug test the Company refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Company unilaterally implemented its contract proposal at a time when no impasse occurred, I shall recommend the Company be ordered, on request, to bargain collectively in good faith with the Union on the terms and conditions of employment of unit employees and, if an understanding is reached, to embody the understanding in a signed agreement.

I shall recommend the Company be ordered, if requested by the Union, to reinstitute the wages and terms and conditions of employment that existed before its unlawful changes, and to make whole unit employees for any losses suffered as a result of its unlawful action in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest, thereon to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[35]

Having found that the Company unlawfully implemented a drug testing program for employees who require treatment for job related injuries, I shall recommend it be ordered, on request, to cancel, withdraw, and rescind the policy and remove from the files of employees notices, reports, or memoranda resulting from application of the August 21, 1990 drug testing program.

To the extent that the unlawful unilateral changes implemented by the Company may have improved the terms and conditions of employment of unit employees nothing in this recommended Order shall in any way be construed as requiring the Company to revoke such improvements.

Finally, it is recommended the Company be ordered to post a notice to its employees attached hereto as an appendix for 60 days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

[35] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, Coastal Chemical Company, Savannah, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Teamsters Local 728 as the exclusive bargaining representative of its employees in the unit described below, by unilaterally implementing changes in wages and terms and conditions of employment of unit employees at a time when no impasse in bargaining with the Union has occurred.

(b) Refusing to bargain with the Union by unilaterally implementing a drug testing program for employees who require treatment for job related injuries.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement:

> All production and maintenance employees, including warehouse employees, truck drivers and truck drivers helpers, employed by the Company at its Savannah, Georgia facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) On request, reinstate the wages and terms and conditions of employment that existed before the unlawful unilateral changes, and make whole unit employees for any loss suffered as a result of these unilateral changes, with interest. However, no provision of this recommended Order shall in any way be construed as requiring the Company to revoke unilaterally implemented improvements in terms and conditions of employment for unit employees.

(c) Bargain collectively, on request, with the Union as the exclusive representative of the employees of the appropriate unit described above, concerning the August 21, 1990 drug testing program and embody any understanding reached in a signed agreement.

(d) On request, cancel, withdraw, and rescind its unilaterally implemented drug testing program for employees who require treatment for job related injuries and remove from the files of employees notices, reports, or memoranda resulting from the application of the August 21, 1990 drug testing program.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Savannah, Georgia, location copies of the attached notice marked ''Appendix.''[37] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Company has taken to comply.

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''